THE COMMON LAW
AND
OUR FEDERAL JURISPRUDENCE
(*Concluded.*)

III

We have been engaged immediately heretofore in considering the law which is administered in the federal courts when adjudicating controversies between citizens of different states, and have shown, it may be thought, some warrant for saying that in matters of "general concern," as distinguished from those in the nature of local questions, these tribunals have long been employed in building an independent body of non-statutory law, or, in that sense, federal common law. It must be admitted, however, that in so terming this body of law, one encounters opposition from respectable authorities who class it otherwise.

Professor Willoughby [122] concedes that it is of "federal creation (or at least of federal judicial determination)," and that it is a substitute "for the state law with reference to matters which by the federal Constitution are left within the exclusive power of the state"; furthermore, that it "is neither laid down in the Constitution, treaties and laws of Congress nor in conformity with the law of the state." He also concedes this body of law is "unquestionably *federal* in the sense that it owes its authority to, and is applied by, the federal courts"; but he nevertheless maintains, "there is good reason for holding it is essentially state law," saying, "The fact that it differs from the law as laid down by the state courts is due to the peculiar circumstances that, under our judicial system, two co-ordinate sets of courts have the power to interpret and determine the common law of the several states." [123] In other words, Professor Willoughby's

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[122] WILLOUGHBY, CONSTITUTIONAL LAW, Vol. II, pp. 1038, 1039.

[123] See also Smith v. Alabama, 124 U. S. 465, 477-8 (1887).

"A determination in a given case of what that law [common law] is may be different in a court of the United States from that which prevails in the judicial tribunals of a particular state. This arises from the circumstance that the courts of the United States in cases within their jurisdiction, where they

thought is that, since, to use his own language, "the federal courts do not sit as tribunals subordinate to the states, but as coordinate with them, . . . they have an independent right to determine what is the non-statutory law of the state, using for [this] purpose the same sources of information that the state courts use in determining for themselves."

Professor Willoughby's view may be said to represent fairly the manner in which those who assert there is no federal common law, and can be none, reconcile the opinions of the federal courts which refuse to follow the law laid down in prior judicial decisions of the state where a case was tried or whose law, for any other reason, would ordinarily be applicable. It would seem, according to this view, that, when the federal courts decide independently of the adjudications in a particular state, after consulting the same sources available to the latter's courts,[124] and arrive at a different conclusion of law from that administered in the state, the law thus derived and applied may, nevertheless, be classed as state law because it most nearly represents the consensus of opinion in the various states respecting the point at issue; or, as one writer on the subject has expressed it, in such instances "the federal courts apply their own judgment to say that the law [governing the case before them] is such as the best reasoned authorities throughout the United States have determined [to be applicable in approximately similar cases], and this may naturally lead the [federal] court to the conclusion that the state court [in question] has been ill-advised, and [in prior cases] has determined the matter erroneously." [125] You may be impressed, however, that this hypothesis represents an ingenious mental effort to change the inherent and fundamental

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are called upon to administer the law of the state in which they sit or by which the transaction is governed, exercise an independent though concurrent jurisdiction; . . . but the law applied [is] none the less the law of that state . . ." per Mathews, *J.*

[124] Snare v. Friedman, 169 Fed. 1, 11-12 (C. C. A. 1909).

"In deciding what the common law of a state may be, they [the federal courts] will resort to the same sources of information as are open to the state courts, and find the evidence of the law where the state courts must seek it, in that general jurisprudence of which we have spoken." Gray, *J.*

[125] 36 Am. L. Rev. 498, 521-5 (1902), E. C. Eliot.

character of a body of law by simply changing its name and calling it, not an indepedent federal common law, but a correct declaration by the federal judges of state common law; and you may well think that the law thus laid down by the federal courts cannot properly be called the law of the state involved, so long as it is not recognized and applied by the courts of the jurisdiction whose law it is supposed to be. In other words, so long as the state law which is disregarded by the federal courts, as presenting an incorrect understanding of, or faulty reasoning from, common law sources, continues to be regarded as correct in cases arising exclusively in the courts of the particular state involved, and the federal rule is neither binding upon nor followed by those tribunals, it can hardly be classed as the authoritative law of such state. Thus, it is difficult to appreciate why the non-statutory law administered by the federal courts should be considered state common law simply because the federal judges, among other sources of information, consult the common-law decisions of the various states, any more than why state determination of law, independently arrived at, after consulting federal decisions based on general principles, should be called federal common law.

General principles of law administered by the United States courts have authority in federal jurisprudence because they have been thus recognized, just as the non-statutory law in a state has authority because it is recognized and administered by the courts of that jurisdiction. It would surely by incorrect to say that the common law of Pennsylvania, for example, is essentially the law of the other states of the Union, because at various times the Pennsylvania courts have applied what they conceived to be the best reasoned view of the majority of the states. On many occasions the courts of Pennsylvania, and of other such jurisdictions, disregard the law laid down by their sister states, and administer principles either of the English decisions or of their own determination; therefore, strictly speaking, the common law of any given jurisdiction may be said to consist of the non-statutory rules announced and administered by its courts to effect just results in cases before them The elements which

comprise this body of non-statutory law are drawn not only from the common-law rules of the various states, and from English decisions, but from other sources; consequently one cannot accurately classify the unwritten law of any one state as being essentially the law of the various states. No more can one properly so classify the non-statutory law administered by the federal courts.

If there existed somewhere in the atmospherre a single uniform body of common-law rules which would be binding on state and federal courts alike, and which all of them implicitly and correctly followed, without variation, the unwritten law of each state, as well as of the federal courts, would be identical with this universal common law; but, needless to say, although some seem to think otherwise, there is no such recognized body of law to which courts may resort for the purpose of obtaining principles of ultimate authority. "The common law," as Mr. Justice Holmes has said, "is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified." [126] Somewhat similar views were expressed by Mr. Justice Mitchell, of the Supreme Court of Pennsylvania, when he said: [127]

> "There is no such thing as a general common law, separate from and irrespective of a particular state or government whose authority makes it law. By whom is a general [common] law prescribed and what tribunal has authority or recognition to declare or enforce it outside of the local jurisdiction of the government it represents? Upon many questions arising in the business dealings of men, the laws of modern civilized states are substantially the same, and it is therefore common to say that such is the law, but, except as a convenient phrase, such general law does not exist. There must be a state or government of which every law can be predicated, and to whose authority it owes its existence as law; without such sanction, it is not law at all; with such sanction it is law without reference to its origin or the concurrence of other states or people. Such sanction it is the prerogative of the courts to declare."

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[126] So. Pacific Co. v. Jensen, 244 U. S. 205, 222 (1916).

[127] Forepaugh v. R. R. Co., 128 Pa. 217, 226, 227, 18 Atl. 503 (1889).

While there is no real body of common law aside from that presented by the decisions of the courts, there is, of course, what, for want of a more descriptive term, has been called the spirit of the common law, consisting of fundamental conceptions of right and wrong so manifest as to be generally accepted and credited; but, after all is said on the subject, it must be admitted that each jurisdiction pronounces its own rules, based on these fundamental truths and the ripened customs of the people concerned, and that every state disregards the decisions of other jurisdictions as it pleases, with the result that the common law throughout one state is dissimilar to the common law of other states in many important respects.[128] The law pronounced and credited as authority by the federal courts may likewise be dissimilar to the common law of the various states; and, since these tribunals apply—to matters of general concern arising in litigation of the diverse-citizenship class, and also to matters in other fields of litigation yet to be discussed—what they, in their independent judgment, consider to be the true general rules, their decisions thus arrived at may well be said to form a federal common law.[129]

The fear has frequently been expressed that to admit the existence of an independent federal common law in the kind of cases we have just been discussing will encourage the United States courts to encroach more generally upon the non-statutory law of the states, and, in the end, to disregard their decisions

[128] "The common law, it is said, we brought with us from the mother country, and which we claim as a most valuable heritage. This is admitted, but not to the extent sometimes urged. The common law, in all its diversities, has not been adopted by any one of the States. In some of them it has been modified by statutes, in others by usage. And from this it appears that what may be the common law of one state is not necessarily the common law of any other. We must ascertain the common law of each state by its general policy, the usages sanctioned by its courts, and its statutes."

Per McLean, *J.*, Wheeler v. Smith, *et al.*, 50 U. S. 55, 78 (1850).

[129] See Vice Chancellor Sandford's remarks in Lynch v. Clarke, I Sandf. Ch. 583, 654-655 (N. Y. 1843): "In my judgment there is no room for doubt, but that to a limited extent the common law (or the principles of the common law, as some prefer to express the doctrine) prevails in the United States as a system of national jurisprudence. It seems to be a necessary consequence—that in a matter which by the Union has become a national subject, to be controlled by a principle co-extensive with the United States, in the absence of constitutional or congressional provision on the subject, it must be regulated by the principles of the Common Law, if they are pertinent and applicable."

in all matters; but, as before said, if such a common law exists, a failure to acknowledge it will not change the fact. Moreover, the fear of acknowledgment overlooks the further fact that Congress at any time, by simply changing the wording of section 34 of the Judiciary Act of 1789, could direct federal courts to follow or disregard state decisions in matters of common law, if either course were deemed desirable. Should the first be done, the federal tribunals, when acting in cases under the diverse-citizenship clause, would never administer an independent national common law, but the common law of the state in which these tribunals were sitting. In the absence of such action, however, under present methods, does there not exist, at least in matters of general concern, what, for all practical purposes, is a federal common law, whether we call it by that name or not?

The next class of cases for consideration is that of *Controversies between States.*

Jurisdiction over such controversies justiciable in their nature, is granted by the Constitution to the federal Supreme Court, and the scope of this jurisdiction, as well as the nature of the law administered in its exercise, can be more clearly understood from an analysis of the case of *Kansas v. Colorado.*[130] Before the incorporation of Kansas and Colorado into the Union as states, the common law was in force in their respective territories, by reason of the Ordinance of 1787. On admission into the Union, each state possessed the inherent right of sovereignty to modify the existing common law by statute. Kansas continued to recognize generally the old English rules governing riparian rights, whereas Colorado changed from the common law and prescribed the doctrine of public ownership of flowing waters.

The State of Colorado, within whose limits the Arkansas River has its source, and through whose territory it flows into Kansas, claimed the right to use the waters of this stream for purposes of irrigation, albeit by so doing such waters should be diminished and the river's flow interrupted. Kansas sought to

[130] Kansas v. Colorado, 206 U. S. 46 (1906).

restrain her sister state, alleging that the latter's action prevented the natural and customary flow of the river into Kansas and through its territory.

The United States filed an intervening petition, claiming the right to control the waters in controversy to aid in the reclamation of arid lands. So far, however, as the national government was concerned, the petition was dismissed, as the threatened diversion did not tend to diminish the navigability of the river, and, therefore, no federal right was prejudiced.

Here, then, was a contest between two sovereign states, one following, and the other refusing to follow, the old common-law rules as to riparian rights. The difficulty which faced the court grew out of the fact that Congress had made no law which reached the case, and lacked power to do so, further, that the law of neither state could prevail against that of the other;[131] facts which, at first sight, might seem to withdraw the matter from judicial consideration. The court, however, having assumed jurisdiction, had to administer some law; but what law?[132] Mr. Justice Brewer, appreciating this situation, disposed of it as though he were a common-law judge; and, in reply to a contention that such a course could not be followed, he wrote:

> "It is [asserted] there is no common law of the United States as distinguished from the common law of the several states. [The same] contention was made in Western Union Tel. Co. v. Call Pub. Co., where the court said: 'Properly understood, no exceptions can be taken to declarations of this kind, [for] there is no body of federal common law separate and distinct from the common law existing in the several states in the [same] sense that there is a body of statute law enacted by Congress separate and distinct from the body of statute law enacted by the several states, but it is an entirely different thing to hold that there is no *common law in force generally throughout the United States.*'"

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[131] The Antelope, 10 Wheaton 66, 122 (U. S. 1825).

[132] JUDICIAL SETTLEMENT OF CONTROVERSIES BETWEEN STATES, JAMES BROWN SCOTT, Carnegie Endowment for International Peace, p. 447.

Judge Brewer quotes Chancellor Kent's view [133] of the common law as "Including those principles, usages and rules of action applicable to the government and security of persons and property which do not rest for their authority upon any express and positive declaration of the will of the legislature." As this body of law "does not rest," the Judge adds, "on any statute or other written declaration of the sovereign, there must, as to each principle thereof, be a first statement; [and] those statements are found in the decisions of courts, the first statement presenting the principle as certainly as the last. Multiplication of declarations merely adds certainly; for after all, the common law is but the accumulated expressions of the various judicial tribunals in their efforts to ascertain what is right and just between individuals in respect to private disputes."

Then, returning to a consideration of the particular matter before the court, the opinion goes on to say:

> "As Congress cannot make compacts between the States, as it cannot, in respect to certain matters, by legislation compel their separate action, disputes between them must be settled either by force or else by appeal to tribunals empowered to determine the right and wrong thereof. Force under our system of government is eliminated. The clear language of the Constitution vests in this court the power to settle those disputes. We have exercised that power in a variety of instances, determining in the several instances the justice of the dispute. Nor is our jurisdiction ousted, even if, because Kansas and Colorado are States sovereign and independent in local matters, the relations between them depend in any respect upon principles of international law. . . . 'Sitting, as it were, as an international, as well as a domestic tribunal, we apply federal law, state law, and international law, as the exigencies of the particular case may demand.' . . . One cardinal rule, underlying all the relations of the States to each other, is that of equality of right. Each State stands on the same level with all the rest; it can impose its own legislation on no one of the others, and is bound to yield its own views to none. Yet, whenever . . . the action of one State reaches through the

[133] I Kent 471.

> agency of natural laws into the territory of another State, the question of the extent and the limitations of the rights of the two States becomes a matter of justiciable dispute between them, and this court is called upon to settle that dispute in such a way as will recognize the equal rights of both and at the same time establish justice between them. In other words, through these successive disputes and decisions, this court is practically *building up* what may not improperly be called *interstate common law.*" [134]

Recently a somewhat similar dispute arose between Colorado and Wyoming,[135] and the federal Supreme Court disposed of it along like lines.

The important principle applied in the cases we are now considering, is that, if a controversy is justiciable in its nature, and no statutory rule controls, the Supreme Court will administer the particular kind of law necessary to effect a just settlement, without regard to the sources from which the law is derived. The court has referred to this law as "common law in force generally throughout the United States," [136] and has said that it "may not improperly be called 'interstate common law' " [137]; but, as it constitutes part of the very considerable body of unwritten rules announced and administered by the federal courts, it might more properly be termed federal common law.

The particular form of federal common law under immediate discussion differs, however, from that administered by the United States courts in disposing of matters of general concern arising in diverse-citizenship cases, in that it affects sovereign states, rather than their individual citizens; but both forms are similar, in that they exist independently of any congressional statute, directing what law shall be administered. The federal non-statutory law as applied in adjudicating matters of general concern, under the diverse-citizenship clause, exists as though section 34 of the Judiciary Act had not been passed; and the

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[134] Kansas v. Colorado, *supra*, p. 96.
[135] Wyoming v. Colorado, 259 U. S. 419 (1921).
[136] Kansas v. Colorado, *supra*, p. 96.
[137] *Ibid*, p. 98.

federal unwritten law in cases between states exists in the absence of any congressional statute directing what law shall be applied; they, therefore, possess the common characteristics of being common law, independently announced and administered by the federal courts, separate and distinct from the common law of the several states.

The next instance for our consideration, of civil jurisdiction in the federal courts, is that which arises, not from the character of the parties (as in the cases between citizens of different states and those between the states themselves), but from the subject-matter of the suit; that is to say, *where the question in controversy involves the national Constitution, the federal laws, or international treaties,* and, consequently, it matters not who may be parties to the litigation.

It is sufficient for present purposes, to discusss only one example under this phase of federal jurisdiction, namely, the regulation of interstate commerce.

Congress, by article I, section 8 of the Constitution, possesses power to regulate commerce among the several states, and may pass any legislation essential to control properly the relations of interstate carriers; but, if the national legislature should not act, then the question arises, are the relations of such carriers to be subject to no federal control, or, when a suit involving their rights and duties is brought in the federal courts, will they be determined judicially in accordance with common-law principles?

In *Interstate Commerce Commission v. B. & O. R. R. Co.,*[136] the federal Supreme Court said:

> "Prior to the . . . Interstate Commerce Act, railway traffic in this country was regulated by the principles of the common law applicable to common carriers, which demanded little more than that they should carry for all persons who applied, in the order in which the goods were delivered at the particular station, and that their charges for transportation should be reasonable."

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[136] 145 U. S. 263 275 (1891).

Later, in 1894, the case of *Murray v. Chicago & N. W. Ry. Co.*,[139] arose, which was an action to recover damages for alleged unreasonable rates charged for transportation of freight, between the years 1875 and 1887. It was argued that, inasmuch as Congress had not prescribed by statute the rules applicable to carriers in such a case, the federal courts possessed no power to determine them; that the silence of Congress must be taken as an indication of the intent to leave such commerce free from all restraint and, therefore, common carriers assumed no common-law liability in undertaking shipments of goods from one state to another.

The court, however, thought otherwise, and, speaking by Mr. Justice Shiras, said:

> "If the theory now contended for by defendant company be correct, then from the foundation of the government [until the passage of the Interstate Commerce Act] it was open to all common carriers engaged in foreign or interstate commerce to act as they pleased in regard to accepting or refusing freights, in regard to the prices they might charge, in regard to the care they should exercise, and the speed with which they should transport and deliver the property placed in their charge. . . . Can it be possible that the transcontinental railways and other federal corporations engaged in foreign and interstate commerce, in the absence of congressional legislation, were not under any legal restraints, and that the citizen, in his dealings with them, was without legal remedy or protection? In the absence of congressional legislation, what law could be applied to them, with regard to matters under the exclusive control of the national government, except the principles of the common law or the law maritime?" [140]

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[139] 62 Fed. 24, 37 (C. C. 1894).

[140] Mr. E. P. Prentice, 9 Col. Law Rev. 375, 383-4 (1909), *Common Law and Interstate Carriers*, says: "Here then frankly is the old argument *ab inconvenienti*. A field of federal jurisdiction has been discovered, unoccupied for a century by any federal statute, and yet from it all state law has been excluded and Judge Shiras repeated the doctrines which were first announced by Mr. Justice Iredell of the authority in the absence of a federal statute of a federal common law."

Then Judge Shiras adds:

"The conclusion I reach upon this subject is that at the time of the separation of the colonies from the mother country, and at the time of the adoption of the Constitution, there was in existence a common law, derived from the common law of England, and modified to suit the surroundings of the people; that the adoption of the Constitution and consequent creation of the national government did not abrogate this common law; that the division of governmental powers and duties between the national and state governments provided for in the Constitution did not deprive the people who formed the Constitution of the benefits of the common law; that, as to such matters as were by the Constitution committed to the control of the national government, there were applicable thereto the law of nations, the maritime law, the principles of equity, and the *common law,* according to the nature of the particular matter; that to secure the enforcement of these several systems when applicable, the Constitution and Congress, acting in furtherance of its provisions, have created the Supreme Court of the United States and the other courts inferior thereto, and have conferred upon these courts the right and power to enforce the principles of the law of nations, of the law maritime, of the system of equity, and of the common law, *in all cases coming within the jurisdiction of the federal courts;* applying, in each instance, the system which the nature of the case demands; that, as to all matters of national importance over which paramount legislative control is conferred upon Congress, the courts of the United States (the Supreme Court being the final arbiter) *have the right to declare what are the rules deducible from the principles of general jurisprudence* which control the given case, and to define the duties and obligations of the parties thereto."

After making this significant statement as to the existence of a federal common law, Judge Shiras applied it to the case in hand thus:

"In determining the obligations assumed by a common carrier engaged in interstate commerce, the court has the right to apply the rules of the common law, unless the same have been changed by competent legislative action; and, therefore, in the present case, all shipments made before the

adoption of the Interstate Commerce Act are governed by the common law, and those made since the adoption of that act by the common law as modified by that act."

The same view was cited with approval in a later case involving an interstate telegraph carrier, namely, *Western Union Tel. Co. v. Call Pub. Co.*[141] The Western Union received for transmission news dispatches from the State Journal Company and the Call Publishing Company, charging the latter a higher rate than the former. The Call Publishing Company contended that the excess charge was unreasonable, and brought suit against the telegraph company in a state court, resulting in a verdict and judgment for plaintiff, which was reversed by the Nebraska Supreme Court, because of trial errors. A second trial again resulted in a verdict and judgment for plaintiff, which was affirmed by the state supreme court; whereupon the Western Union Company sued out a writ of error to the Federal Supreme Court.

The latter court affirmed, Mr. Justice Brewer saying:

"The contention of the telegraph company is substantially that the services which it rendered to the publishing company were a matter of interstate commerce; that Congress has sole jurisdiction over such matters, and can alone prescribe rules and regulations therefor; that it had not, at the time these services were rendered, prescribed any regulations concerning them; that there is no national common law, and that whatever may be the statute or common law of Nebraska is wholly immaterial; and that, therefore, there being no controlling statute or common law, the state court erred in holding the telegraph company liable for any discrimination in its charges between the plaintiff and the journal company."

To these contentions Judge Brewer answered:

"While there is no body of federal common law separate and distinct from the common law existing in the several states in the [same] sense that there is a body of statute law, [yet] it is an entirely different thing to hold that

[141] 181 U. S. 92, 94, 100-102 (1900).

> there is no common law in force generally throughout the United States and that the countless multitude of interstate commercial transactions are subject to no rules and burdened by no restrictions other than those expressed in the statutes of Congress."

Then he puts the question, "Can it be that the great multitude of interstate commercial transactions are freed from the burdens created by the common law, as so defined, and are subject to no rule except that to be found in the statutes of Congress?" and answers, "We are clearly of opinion that this cannot be, and that the principles of the common law are operative upon all interstate commercial transactions except so far as they are modified by Congressional enactment."

Thus it may be seen, the authorities clearly indicate that, when there is no congressional statute prescribing the law to be administered in matters over which the national legislature has exclusive control, the federal courts do not always refuse for that reason to decide the cases brought before them; on the contrary, in the cases which we have been examining, the supreme court took jurisdiction because the litigation before it involved transactions covered by the laws of the United States, and, on each occasion, it applied such common-law principles as the court, in the independent exercise of its judgment, considered appropriate and just under the circumstances involved. What is said in those cases regarding the applicability of common-law principles to interstate commerce would seem to make them equally applicable to other matters under the control of the federal government, and, therefore, within the laws of the United States.

Reason as you may, the decisions under discussion form part of a body of unwritten, or common law, separate and distinct from the common law of any particular state and, having been pronounced by the federal courts and followed as authorities therein, may be classified as constituents of an independent federal common law; but the particular branch of this common law which we have been engaged in considering, namely, cases where the question in controversy involves matters within the exclusive control of the national government, becomes, from our

present point of view, less important, and the cases thereunder diminish in value, as Congress adequately provides by legislation for the subjects entrusted by the Constitution to its control. As this occurs, the common law is used by the federal courts, not to work out substantive rights in the absence of congressional action, but to interpret and amplify rights already provided for by statute; in other words, under such circumstances, the federal courts resort to the common law for purposes of interpretation more than in the exercise of annunciatory powers.

In addition to the phases of civil jurisdiction thus far considered, and as relevant to the interpretative power of the courts, it may be well to call attention to certain instances of common-law interpretation covering subjects dealt with in the Constitution itself; and also, to examine the subject of public policy as a separate ground of common-law decisions in federal cases.

When discussing the criminal side of federal law, we observed that, as to certain matters contained both in the Constitution and congressional statutes, the United States judges necessarily are obliged to resort to external sources for purposes of interpretation, and that, as a consequence, they have developed, by this process, a kind of independent "common law resting on national authority";[142] or at least, they have recognized that there is a common law imbedded in federal jurisprudence. The same process is inherent in civil matters.

By the Fourteenth Amendment to the Constitution, it is provided that "all persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States." In construing this provision Chief Justice Waite observed:[143] "The Constitution does not say in words who shall be natural born citizens; resort must be had elsewhere to ascertain that." Then he proceeded to resort to the common law as an aid in the construction of this provision. Later, Justice Gray,[144] in considering the organic law, after noting with approval Chief Justice Waite's views, also stated that:

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[142] WILLOUGHBY, CONSTITUTION, Vol. II, p. 1030.
[143] Minor v. Happersett, 21 Wall. 162, 167 (U. S. 1874).
[144] U. S. v. Wong Kim Ark, 169 U. S. 649, 654-5 (1897).

> "The provisions [in question] must be interpreted in the light of the English common law, the principles and history of which were familiarly known to the framers of the Constitution; [for] the language of the Constitution, as has been well said, could not be understood without reference to the common law."

The right of eminent domain can be exercised by the United States in any part of the country, so far as may be necessary to the enjoyment of the powers conferred upon the national government. This right is recognized by the Fifth Amendment in these words, "nor shall private property be taken for public use without just compensation." The question as to what court has jurisdiction over the mode in which the right shall be exercised came before the Supreme Court in *Kohl v. United States.*[145] Congress authorized the secretary of the treasury to purchase a suitable building in Cincinnati to accommodate the United States courts, and appropriated the necessary money. It was contended that, inasmuch as the statute did not expressly authorize the condemnation proceedings to be had in the Circuit Court, nor provide a mode of taking the land and determining compensation, that Court was without jurisdiction. The Supreme Court held otherwise, Justice Strong saying: [146]

> "The Judiciary Act of 1789 conferred upon the circuit courts of the United States jurisdiction of all suits at common law or in equity, when the United States, or any officer thereof, suing under the authority of an act of Congress, are plaintiffs. If then, a proceeding to take land for public uses by condemnation may be a suit at common law, juris-

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[145] Kohl v. U. S., 91 U. S. 367 (1875).

[146] *Ibid*, 375, 376.
Mr. Justice Field dissented, saying: "The federal courts have no inherent jurisdiction of a proceeding instituted for the condemnation of property; and I do not find any statute of Congress conferring upon them such authority. The Judiciary Act of 1789 only invests the circuit courts of the United States with jurisdiction, concurrent with that of the State courts, of suits of a civil nature at common law or in equity; and these terms have reference to those classes of cases which are conducted by regular pleadings between parties, according to the established doctrines prevailing at the time in the jurisprudence of England."

> diction of it is vested in the Circuit Court. That it is a 'suit' admits of no question. . . . When, in the eleventh section of the Judiciary Act of 1789, jurisdiction of suits of a civil nature at common law or in equity was given to the circuit courts, it was intended to embrace not merely suits which the common law recognized as among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined as distinguished from rights in equity, as well as in admiralty. *The right of eminent domain always was a right at common law.* It was not a right in equity, nor was it even the creature of a statute. The time of its exercise may have been prescribed by statute; but the right itself was superior to any statute. That it was not enforced through the agency of a jury is immaterial; for many civil as well as criminal proceedings at common law were without a jury. It is difficult, then, to see why a proceeding to take land in virtue of the government's eminent domain, and determining the compensation to be made for it, is not, within the meaning of the statute, a suit at common law, when initiated in a court [of law]. It is an attempt to enforce a legal right. It is quite immaterial that Congress has not enacted that the compensation shall be ascertained in a judicial proceeding. That ascertainment is in its nature at least quasi-judicial. Certainly no other mode than a judicial trial has been provided."

This case is significant not only as showing that the federal judges were obliged to resort to common-law sources for purposes of constitutional interpretation, but that they had to apply common-law principles in order to give effect to the right of eminent domain possessed by the United States Government. So much for the cases of interpretation of civil matters in the Constitution and statutes.

Public Policy

This brings us to the application by federal courts of rules of public policy, long recognized as a common-law ground of decision. In origin, it is likely that "agreements to restrain trade or to promote litigation were the first to elicit the principle that the courts would look to the interests of the public in giving

efficacy to contracts";[147] and while, at the present time, it may not be possible to circumscribe or define the exact limits within which the principles of public policy will be applied, judges repeatedly recognize them, and use them as the bases of decisions in particular cases. If one endeavored to obtain, from the varied and numerous judicial statements, a clear idea of the nature and limits of public policy as a ground of judicial decision, he would meet with no little difficulty; but it is clear that certain definite principles have come to be recognized, the application of which to particular instances necessarily varies with the progressive development of public opinion and morality, and that, from time to time, as the public interests and convenience require, these principles, like other tenets of the common law, will expand accordingly. In the field of contracts, Sir George Jessel, Master of the Rolls, once remarked, "You have this paramount public policy to consider, that you are not lightly to interfere with the freedom of contract."[148] Courts are positive, however, in their refusal to enforce various kinds of contracts which are definitely contrary to good morals, or which threaten the dignity, respect or existence of the legal tribunals themselves, or of the government; and the federal courts assert the right, exercised by common-law tribunals, to decide such cases on general principles. There is no precise way of determining how extensively these principles may be applied, for, in the field under discussion, United States judges are guided, like their brothers in other courts, by the extent to which public interests, morals and convenience require protection. It is not necessary, therefore, to attempt a minute analysis of federal cases in which public policy has been recognized as a ground of decision; but it may be helpful to point out a few instances, which, no doubt, will suggest others.

A consul-general of a foreign government, residing in this country, entered into a contract whereby, in consideration of a

[147] SIR WILLIAM ANSON, LAW OF CONTRACT (15th ed. 1920), p. 243, citing Y. B., 2 Henry V, pl. 26 (1414); Egerton v. Earl Brownlow, 4 H. L. C. 1, 237 (1853). See, however, SIR FREDERICK POLLOCK, CONTRACTS (8th ed. 1911), p. 328, who thinks the discouragement of wagers was the foundation of the doctrine.

[148] Printing Co. v. Sampsom, L. R. 19 Eq. 462, 465 (1875).

stipulated percentage, he agreed to use his influence, in favor of a local manufacturing company, with an agent sent by the government which the consul-general represented, to examine and report in regard to the purchase of arms; and, through the exercise of such influence, sales of arms were made by the company to the government. The consul-general sued to recover the percentage,[149] in a federal court; but it refused to enforce the contract, on the ground of public policy. Similarly, the federal courts declined to enforce a contract whereby A agreed to procure B's appointment as special consul in certain cases against the United States, if B would agree to pay over to A one-half the fee obtained from the government;[150] and, in like manner, they have refused relief in other cases where the contract sought to be enforced or the means pursued were either illegitimate or corrupt. Justice Swayne stated in one such case:[151]

> "It is a rule of common law of universal application that, where a contract, express or implied, is tainted with either immorality or is contrary to public policy as to the consideration or thing to be done, no alleged right founded upon it can be enforced in a court of justice";

and it may be said that this common-law rule was the controlling force in all the federal decisions under the present heading, including *Marshall v. B. & O. R. R. Co.*[152] In that case, Marshall, a citizen of Virginia, sued a railroad company incorporated in Maryland, to recover the sum of $50,000, which he alleged they owed him under a special contract for services in obtaining the enactment of a statute by the legislature of Virginia, which granted to the company a right of way through the latter state to the Ohio River. The case was brought up on a writ of error from the Circuit Court of Maryland to the Supreme Court of the United States, which latter tribunal held the contract void.

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[149] Oscanyan v. Arms Co., 103 U. S. 261 (1880).
See also Tool Co. v. Norris, 69 U. S. 45 (1863).
[150] Meguire v. Corwine, 101 U. S. 108 (1879).
[151] Trist v. Child, 88 U. S. 441, 448 (1874).
[152] Marshall v. B. & O. R. R. Co., 57 U. S. 314, 333-34 (1853).

Justice Grier, resting his opinion on general common-law principles, stated:

> "It is an undoubted principle of the common law that it will not lend itself to enforce a contract to do an act which is illegal, or which is inconsistent with sound morals or public policy; or which tends to corrupt or contaminate, by improper influences, the integrity of our social or political institutions. . . . Legislators should act from high considerations of public duty; public policy and sound morality do therefore imperatively require that courts should put the stamp of their disapprobation on every act, and pronounce void every contract, the ultimate or probable tendency of which would be to sully the purity or mislead the judgments of those to whom the high trust of legislation is confided."

The cases last discussed are of value mainly because of their broad reference to general principles of the common law as a source of decision in the federal courts; but they also represent acknowledgments by the United States courts of common-law principles of public policy which, because of their independent recognition in, and actual application by, those tribunals can be considered as thus incorporated into, and forming part of, a federal common law. One might analyze other phases of federal jurisprudence, and no doubt discover the existence of still additional examples of such acknowledgment and recognition; but, possibly you will agree, enough examples have been given to show a real basis for the belief that there now exists a system of federal common law, in the sense of a considerable body of non-statutory rules accredited in, and administered by, the United States courts without regard to, or independent of, the local sources from which they may be derived. Of course, this federal system can never be as comprehensive in its scope as in the case of an ordinary common-law jurisdiction, because the national government itself is one of limited power; but, nevertheless, the authorities already examined show a large field of common-law development.

As we have seen, in litigation between the states, the federal courts have of necessity resorted to the general principles

of the common law. Again, in many instances of the exercise of jurisdiction purely because the cases involved the laws of the United States, these tribunals have gone to the common law to work out the ends of justice; and they have also gone to that source for necessary light in construing the national Constitution and acts of Congress, even when the law involved concerned matters of a criminal nature. While none of the cases we have reviewed is broad enough to be taken as a recognition of the rule, prevailing in what are known as common-law jurisdictions in the strict sense of that term, that the *lex scripta* must be construed so as to conform to all the relevant general principles of the common law, not repealed or modified by legislation, such cases are of interest as showing recognitions by the United States courts of the fact that relevant common-law customs and general principles must be taken into account in order to administer our federal jurisprudence properly; that, at least to this extent, these customs and principles form part of our national legal system; and that, in many instances, they may apply with controlling force. As to the group of cases involving what the federal Supreme Court has referred to as "a common law of interpretation resting on national authority," [188] while the opinions in some of them may possibly suggest that the names, customs and general principles of the common law were used therein more as aids to the construction of the written law than as substantive law itself, yet, in other cases which we have reviewed, particularly those within the diverse-citizenship class, and in the class covering litigation between the several states of the Union, the federal courts have gone further. In these two last-mentioned classes, the courts have not only resorted to the general principles of the common law as an aid to interpretation but also as containing governing rules. Moreover, in the diverse-citizenship cases, where the litigation involved matters of general concern, the federal tribunals, as we have seen, have departed from the state common law as decided by the local courts and administered their own independent view of applicable general principles, without regard to the source whence derived.

[188] Smith v. Alabama, 124 U. S. 465, 478-9 (1887); and see note 61, *supra*.

True, in some of the opinions, the law administered is treated as though common to all the states, and called "interstate common law," [154] but, since this name represents a fiction, it would tend toward greater frankness, generality, equality and certainty [155] in the administration of the law were it plainly acknowledged for what it is—federal common law—and its limitations defined. If we have a federal common law, it should be recognized as such; then, in course of time, the restrictions to which it is heir, and the kind of cases to which it properly applies, would be clearly indicated by a series of decisions. In short, it would become an acknowledged system, of which all litigants, not judicially classified as bound by or entitled to the laws of the separate states, would be given full and equal advantage; and we would not, as at present, have common-law principles administered in the United States courts according to a method whereby a distinction exists between suitors in the same class, so far as classes are now marked out by the written law (that being the only sort of classification presently recognized), some suitors enjoying the whole field of the unwritten law, from which the federal judges may select such principles as they, in their unrestricted judgment, may conceive to be applicable to the facts before them, while others in the same recognized class must have their cases determined according to the locally restricted rules of the common law as decided by the jurisdiction, or state, in which the litigation in the federal courts happens to be tried. All of which leads to the conclusion that we should acknowledge what, it seems, exists—an independent system of federal common law; for, though restricted in scope and not to be claimed as a source of jurisdiction, this system plays too great a part in our national jurisprudence to be refused recognition and a free right of development within its peculiar limitations.*

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[154] Kansas v. Colorado, 206 U. S. 46, 98 (1906); and note 134, *supra*.

[155] HARLAN F. STONE, LAW AND ITS ADMINISTRATION, 10.

* This is the last of a series of three articles appearing in successive issues of the PENNSYLVANIA LAW REVIEW.